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In the
Supreme Court of the United States

OCTOBER TERM, 1955

No. 404

OFFUTT HOUSING COMPANY, a Corporation, *Petitioner,*

vs.

COUNTY OF SARPY and ROBERT M. EBY, TREASURER OF COUNTY OF SARPY, NEBRASKA, *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF OF *AMICUS CURIAE*

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THE ARGUS PRESS, SEATTLE

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BRIEF OF *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

Grant County, Washington, appears herein as *amicus curiae* pursuant to Revised Rule 42 of this Court.

Moses Lake Homes, Inc. (R. 75), a Washington corporation, was organized to construct and operate 400 rental housing units on federal lands at Moses Lake (now Larson) Air Base in Grant County, Washington. The lease-mortgage-FHA arrangements are almost identical to those appearing here. In 1952, Grant County assessed the improvements to the Moses Lake Company for 1953 taxes. Section 11 of the Moses Lake lease provided:

"11. Upon the expiration of this lease, or earlier

> termination, all improvements made upon the leased premises shall *become* the property of the Government without compensation. * * *." (Pl.'s Exh. 3, Wash. Sup. Ct. No. 32442)

Immediately following the assessment, the parties, without consent of the mortgagee or the F.H.A., presumed to modify this section retroactively to provide the improvements were "to remain" the property of the Government. Section 11 of the lease in this case provides (R. 138):

> "11. Upon the expiration of this lease, or earlier termination, all improvements made upon the leased premises shall *remain* the property of the Government without compensation. * * *."

Three days after the execution of the "Modification," the Moses Lake corporation brought suit against Grant County to enjoin collection of property taxes. The injunction was denied after trial on the merits. The Moses Lake corporation appealed the decision to the Washington Supreme Court, No. 32442, but withdrew its appeal prior to argument and the judgment was affirmed on *remittitur*. There, as here, the United States took no part in the action.

Grant County then assessed taxes for subsequent years and Moses Lake again sought to enjoin alleging that the trial court had found "title" was in the Government thus the denial of the injunction was not *res judicata*. The case is now on appeal before the Washington Supreme Court both on the merits and on the defense of *res judicata*. The decision herein on the fedral issues will control the determination of the Washington Court.

The Moses Lake situation differs from this in that Grant County admittedly provides from its tax funds:

> "Police and sheriff protection, fire protection, and the usual grade school and educational facilities." (No. 32442, Find. XVI, Tr. 114, Not Assigned as Error)

to the project and its residents. Appellant alleges otherwise here.

The further and perhaps primary difference is that the Moses Lake houses are upon lands over which the state has concurrent jurisdiction. Here appellant strenuously urges that Offutt homes are within the "exclusive" jurisdiction of the United States.

The position of *amicus curiae* is that "exclusive" jurisdiction in the sense a federal enclave is considered outside state territorial boundaries no longer exists. In too many fields states have reserved or Congress has granted the states certain taxing, police, and other powers, with concurrent tax supported duties. "Exclusiveness," if it exists at all, must therefore be examined with relation to specifics.

If, however, appellant prevails on the issue of exclusive federal jurisdiction, we submit the opinion herein should so specify, leaving the many projects located upon concurrent jurisdiction areas to another day.

STATEMENT OF THE CASE

Much, if not most, of the testimony in this case was an attempt to construe the various documents, statutes and applicable Constitutional concepts. Except for testimony on the length of life of the buildings, the documents speak for themselves. The balance has never been a proper subject for testimony.

Appellant, a Nebraska corporation, was formed December 23, 1950 (R. 156). Ten of its 80,000 shares were termed preferred and issued to the Federal Housing Commissioner (R. 94, 148). A good portion of the land involved was purchased and donated by the Omaha Chamber of Commerce for the project (R. 11, 32, 37).[1]

1. The Lease (R. 132-143)

The lease was executed on January 18, 1951,[2] and the mortgage February 1, 1951 (R. 179). Since each document not only contemplated but was conditioned upon the other, the two must be treated as an integrated transaction. Apparently both documents were upon general F.H.A. forms (R. 68, 70).

In exchange for $100 per year, appellant

> "Under authority of the Act of August 5, 1947 (10 U.S.C. 1270) and the Act of August 8, 1949 (P.L. 211, 81st Cong.) [12 U.S.C. Sec. 1748 (a) to (e)]" (R. 132)

leases bare land from the Air Force for a period of 75 years (R. 132):

> "For the purpose of erecting, maintaining and operating a housing project, consisting of approximately 611 units, substantially in accordance with outlined plans and specifications submitted to the Department of the Air Force and in accordance with the detailed plans and specifications to be ap-

[1] The appellant in the trial court attempted to disassociate itself with the gift (R. 48). Its counsel, Mr. Reed, is apparently the same Charles E. Reed who was President of the Chamber of Commerce and who executed the deed (R. 190).

[2] The lease was executed in Omaha by appellant (R. 100, 143). Air Force Notaries Public apparently do not take their duties seriously as unaccountably the same document was allegedly notarized in Arlington, Virginia, on the same day (R. 143).

proved by the Federal Housing Commission." (R. 132)

The appellant borrowed the money to build the project from a bank. The loan was secured by a mortgage on its leasehold interest in the land and upon the improvements to which it warranted it had title (R. 171). The mortgage was insured by the F.H.A.

The Air Force, with consent of the Federal Housing Commissioner, could terminate the lease for non-payment of the $100 rental but the security holders could pay the rental and the F.H.A. could reinstate the lease within nine months of any notice to it of default (R. 140). Possession was in appellant but the Air Force reserved the right to "re-enter" (R. 133) and inspect (R. 139). The area was subject to reasonable A. Force Security and Safety regulations (R. 138).

Appellant agreed to lease its housing units on a priority basis to military and civilian personnel working on the base. This included contractor's employees. Absent these, the units were open to anyone (R. 134-5). All tenancies were for a year and then on a month to month basis. Leases to other than military or civilian personnel connected with the base could be terminated by appellant in the event Congress or the President declared a National Emergency (R. 136).

Under Lease section 4 (R. 136), when the mortgage was paid (and the F.H.A. no longer determined the rental rates) the rents would be set by mutual agreement of the Commanding Officer and appellant, but they could be no less than the "rents then in effect" (R. 136). Appellant must use due diligence to protect the

premises from damage and must comply with all local "laws, ordinances and regulations" with

> "regard to construction, sanitation, licenses or permits to do business, and other matters." (R. 136)

Lease, Section 8 (R. 137) provides:

> "That the Lessee shall pay to the proper authority, when and as the same shall become due and payable, all taxes, assessments, and similar charges, which, at any time during the term of this lease may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises." (R. 137)

The above pertains to taxes upon improvements. Section 8 provides as to the land (R. 137):

> "In the event any taxes, assessments or similar charges are imposed with the consent of the Congress of the United States upon the property owned by the government and included in this lease (as opposed to the leasehold interest of the Lessee therein), this lease shall be renegotiated so as to accomplish an equitable *reduction* in the rental provided above * * *."

Thus if taxes were imposed upon the bare land, the $100 annual rental would be reduced (R. 137).

If the improvements were "government property," section 8 would speak of increasing rental rates to appellant's tenants. Little can be more specific that taxes on the improvements were to be paid by the lessee. Taxes upon government property—the bare land—would also be paid by appellant who would then pay the Air Force reduced ground rent. If taxes on the 5 million dollars of improvements were contemplated, the $100 per year would hardly suffice. Yet this is the *only* "government property" spoken of.

Pursuant to 5 U.S.C.A. §§626s to s-2 (Cum. Supp.), the Air Force agreed to sell to "*the Lessee's housing project*" (Lease R. 137) certain utility services. If the lessee damaged or destroyed "government property," it must be replaced or paid for (Lease, Sec. 16, R. 139). In contrast, if any portion of the housing project were destroyed, the insurance was payable *only* to the lessee and security holder (Lease, Sec. 20, R. 141-142). The appellant could pocket the entire proceeds if the security holder and its insurer agreed (Mtge. sec. 6, R. 176)—the Air Force was entitled to nothing. If the project were condemned by the government, the mortgagee could insist that the condemnation award went to reduce the mortgage debt (Mtge. sec. 7, R. 176). Again the Air Force was entitled to nothing. In the event of default the security holder had the right to take over the lease (R. 140).

2. The Mortgage (R. 169-182)

The appellant on February 1, 1951, mortgaged the following to the Manufacturers Trust Company of New York:

[1] "All right, title, interest and privileges of the mortgagor in and to that certain ground lease between the Secretary of the Air Force representing the United States of America, and Mortgagor, dated January 18, 1951 * * *." (R. 170)

* * * * * * * *

[2] "Together with the privileges and appurtenances to the same belonging, and all of the rents, issues, and profits which may arise or be had therefrom; and (R. 170)

[3] "Together with all buildings and improvements of

every kind and description now or hereafter erected, or placed thereon, and all fixtures, including but not limited to all gas and electric fixtures, engines and machinery, radiators, heaters, furnaces, heating equiipment, steam and hot-water boilers, stoves, ranges, elevators and motors, bathtubs, sinks, water closets, basins, pipes, faucets and other plumbing and heating fixtures, mantles, refrigerating plant and refrigerators, whether mechanical or otherwise, cooking apparatus and appurtenances, furniture, shades, awnings, screens, blinds and other furnishings; and (R. 170-171)

[4] "Together with all building materials and equipment now or hereafter delivered to said premises and intended to be installed therein." (R. 171)

Further:

"The Mortgagor, represents to and covenants with, the Mortgagee, that the Mortgagor has a good right to sell and convey said premises; that they are free from encumbrance * * *. The intention being to convey hereby *an absolute title in fee simple,* including all rights of homestead and other rights and interests as aforesaid." (Emphasis supplied) (R. 171)

Thus appellant mortgaged (1) its leasehold interest, (2) its personal property, and (3) its buildings and improvements. Few words of ownership and title can be more clear than a fee warranty.

By this mortgage plus F.H.A. approval, appellant borrowed $4,949,100 at 4% interest (R. 172). Payments were $22,683.37 per month or $272,800.44 per year (R. 172). The appellant also covenanted to pay

(1) The F.H.A. insurance premium (R. 174); and

(2) All taxes and assessments (R. 175).

The insurance policies taken out by the appellant on the project are not in this record. However, we presume they are the same as those in *Moses Lake* case which insured the buildings and improvements to the private corporation and the security holder *only*.

The mortgagee is a private corporation. The F.H.A. insures the loan for a consideration and its function is limited to the protection of the security for the period of the mortgage only.

3. Limited Assignment of Rents (R. 182-8)

In July, 1953, the appellant required $28,771.56 to pay a mortgage installment. It borrowed this sum from the County Bank of Omaha and for security assigned the rents (its accounts receivable). The assignment represented:

> "Offutt Housing Company *is the owner* of 611 housing units located at Offutt Field, Sarpy County, Nebraska * * *." (R. 182) (Emphasis supplied)

And further:

> "Offutt Housing Company hereby assigns to Douglas County Bank of Omaha all rentals from *its* housing project at Offutt Field, Sarpy County, Nebraska * * *." (Emphasis supplied) (R. 183)

The life expectancy of the buildings is less than the term of the lease. There is no cost to the government whatsoever for the project. Here as in the Moses Lake case neither the Air Force nor any federal agency shares the profits, the management or the operation of the project subject to security and safety requirements. Cost of the water purchased from the Air Force is esti-

mated at $2,350 annually (R. 163) and this amount is included in the rental (R. 164). The appellant maintains roads on its leased property and the Air Force the roads on the non-leased area (R. 110). The manager and maintenance employees are employees of the appellant (R. 163).

The average rental is $71.04 (R. 130) monthly. *If* no local taxes had been included in the project analysis, the increased rental would be $1.47 per month—perhaps $2.00 per month for future years.[3] However, local taxes of $13,904 annually were included in the project analysis (R. 164). The amount is more than coincidentally close to the actual taxes involved—$10,783.45 in 1952 on the partially completed project and $15,865.69 (R. 47) on the completed homes. Thus to uphold the tax would result in 26c per unit per month rental increase.[4] Offutt rentals apparently approximate private rentals nearby (R. 46).

Of the 611 units, 300 were reserved for officers (R. 59) who also have the larger homes (R. 167). The Commanding Officer stated that the officers took the "non-deplorable" (App. Br. p. 3) "low rental" houses in order to "subsidize" enlisted personnel (R. 59, 64-65). Appellant states that maximum rentals are fixed by the F.H.A. with the "concurrence" of the Air Force who considers the ability of the base personnel to pay (R. 66). This is questionable. Rental is and must be

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[3] $10,783.45 ÷ 611 = $17.65 per year; $17.65 ÷ 12 = $1.47 per month (see R. 5, 144A, 164).

[4] $15,865.69 taxes on completed project less $13,904 taxes estimated and included in rent = $1,961.69 total per year. This divided by 611 units = $3.21 per year or 26c per unit per month (See R. 144C, 164).

based upon the amortized gross cost of the project, the cost of each unit being fixed by law (R. 158). Quarters allowances are specifically fixed by Congress, 37 U.S. C.A. §252.[5]

Local taxes are for both general and specific purposes. For example, if property is not located within a school district, the taxes levied against that property will not include amounts for a school district. This would be the only explanation for the statement in the project analysis that State and local school taxes were assumed to be not applicable because other "special local taxes"—for the "cost of street and utility maintenance" *were* deemed applicable (R. 164) and included.

SUMMARY OF ARGUMENT

I. "*Exclusiveness*" *of Jurisdiction*: The Nebraska court has held that its laws did not cede exclusive tax jurisdiction of this land to the United States (R. 205). This is a state question and on its own law, Nebraska's decision is final. Unless an overriding Federal statute exists asserting exclusive federal jurisdiction for state tax purposes (or more properly, denying to Nebraska that which it did not cede), Nebraska has tax jurisdiction over the project.

II. "*Ownership*": Under general as well as Nebraska law (R. 208-209), improvements under this type of a lease are taxable to the lessee. This is true even if the lessor is an exempt state body. It is also true when the lessor is the United States unless Congress has specifi-

[5] Enlisted men receive from $51.30 to $96.90 and officers $68.40 to $171.00.

cally prohibited taxation of the lessee. The reason for the rule taxing such improvements at their full value is that the bundle of rights in the lessee constitutes beneficial ownership. The bare title and reversionary interest in the lessor does not alter that substantive beneficial and taxable ownership where (1) the improvements will not last the term, (2) all insurance in the event of loss is the sole property of the lessee and its secured creditors, (3) the documents warrant fee title of the improvements in the lessee, and (4) where no question exists as to the personalty.

This, too, is a pure question of state law. It controls unless a contrary federal common law exists or a Congressionally stated federal policy is controverted. The omnibus as well as specific federal policy supports state taxation.

The situation is very similar to that of *Helvering v. Clifford*, 309 U.S. 331, 84 L.Ed. 788 (1940) and subsequent cases holding one may not escape federal income taxes by formalizing a transfer in trust while retaining true beneficial ownership.

III. *Consent of Congress*: Every appellate court to which this issue has been presented has held that Congress has granted the requisite consent. Federal statute declares that the lessee's interest or property

"shall be made"

subject to state taxation, 5 U.S.C.A., §626s. The Military Housing Act declares that if the project is acquired by the Federal Housing Commission it shall remain subject to state taxation, 12 U.S.C.A. §1248f (1949).

ARGUMENT

I. "Exclusive" Jurisdiction

Appellant bases its argument on the erroneous premise that the United States has some sort of "exclusive over-all" jurisdiction over the Offutt land area. True exclusive jurisdiction quite obviously does not exist.[6] In general, Congress may assert exclusive legislative jurisdiction

> "over all places purchased by the consent of the legislature of the state"[7]

for forts, magazines, arsenals, dock yards and other needful buildings, Art. I, §8, Cl. 17. A state may reserve such

> "Concurrent jurisdiction as is not inconsistent with the jurisdiction ceded to the United States." *James v. Dravo,* 302 U.S. 134, 82 L.Ed. 155 (1937)

It was early decided that the state may reserve to itself the right to tax private property within the federal area, *James v. Dravo, supra; Ft. Leavenworth R. Co. v. Lowe,* 114 U.S. 525, 29 L.Ed. 264 (1884); and see 14 Wash. Law Rev. 1, 6 (1939).

Appellant states Nebraska law did not reserve the right to tax its property. Since we are bound by Nebraska's interpretation of its own law, appellant's claim to a private tax immunity must find some other source.

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[6] The state has "jurisdiction" over this area to impose and collect business, sales, income, etc., taxes, 4 U.S.C. §§104-110; Congress provides a federal violation of a state law under 14 U.S.C. §13, the state has jurisdiction of civil actions for wrongful death, 16 U.S.C. §457; and under state workmen's compensation acts, 40 U.S.C. §290.

[7] The word "purchased" means an actual purchase for consideration, *Chi. R. I. & Pac. R. Co. v. McGlinn,* 114 U.S. 542, 29 L.Ed. 270 (1884).

If under Nebraska law, it *has* reserved tax jurisdiction, and this is not only consistent with but directly follows specific Congressional direction, the doctrine of exclusive jurisdiction as announced in *Surplus Trading Co. v. Cook*, 281 U.S. 647, 74 L.Ed. 1091 (1929) is simply not applicable.

II. The Improvements Would Be Taxable to Appellant Under Common Law

A. Personal Property

The tax assessed against appellant was for (R. 144a):

(1) "Improvements on leased lands"	$755,785,
(2) Household appliances	69,695,
(3) Appellant's office equipment	205
	$825,685

The personal property is unquestionably and completely owned by appellant subject to security interests (R. 190A-194). It is taxable unless Nebraska ceded its taxing jurisdiction which its Supreme Court denies. Further, Congressional action has specifically made such items taxable. Appellant however, urges that (contrary to his position on the lessee's interest) that this property is not taxable because federal act only authorizes state taxation of the "lessee's interest" and as to this property it is not a lessee (Ap. Br. 57).

B. Improvements Upon Federal Realty

There has been no attempt to tax the realty or to include its value in the measure of the tax (R. 144a). The issue is limited solely to the value of the improvements.

1. What is taxed—Valuation

This is perhaps the most misunderstood in the field of taxation. Without consent, a State may not tax property "owned" by the federal government. Since "title" usually is consonant with ownership, it is easy to conclude that the State may not tax property when "title" is in the United States.

A more correct statement would be that the State may not include tax exempt interests in its valuation of property for tax purposes. Under general and Nebraska common law (R. 209), bare legal title, a possibility of reverter or other reversionary interest, or the lessor's interest in a lease of 99 or 75 years, is not such an interest to prevent taxation of the full value of the improvements to the lessee. This is particularly true where the improvements will not last the length of the term and when all rents from sub-lessees and profits accrue to the lessee.

Snce this type of lessee under Nebraska law is taxed to the full value of the improvements, appellant raises no federal question unless he shows that when the lessor is a tax exempt federal entity, that the value of the lessor's interest has been included. The lessee would then be entitled to a tax reduction to the value of that exempt interest but no more. He must establish the value of that interest which has not been done.

The supporting case law is set forth *infra*.

2. "Title"

"Title" is not the keystone. It is but one incident in total ownership. Often, as in trusts, title is completely distinct from "beneficial" ownership. In tax matters,

the clearest example is found where the United States sells property retaining title for security purposes. There the United States has: (1) title; (2) a reversionary interest; and (3) an "equity" in the taxed property to the extent of the unpaid sales price. Neither of these interests alone, nor their combination, prevents local taxation of the sold item at its full value to the private purchaser, *S. R. A. v. Minnesota*, 327 U.S. 558, 90 L.Ed. 851 (1946). This is true even though the seller has yet received no payments.

In a conditional sales contract, the seller has created or originally owns the complete value of the *res* sold. In a long-term lease situation as here, the lessee creates the value by constructing at its own expense and for its own profit improvements which will not last the length of the term. The lessor's reversionary interest in the improvements is but slightly more than zero. The "value" thereof even less.

The situation is strikingly similar to the doctrine first announced in the income tax case of *Helvering v. Clifford*, 309 U.S. 331, 84 L.Ed. 788 (1940). There to avoid federal income taxes a taxpayer transferred certain interests in trust to others retaining a formal trustee's interest plus the rights of control and profit. This Court properly held the rights retained was a beneficial and thus taxable ownership of the income from the entrusted items. The "bundle of rights" he retained was too substantial for him to complain of being taxed as sole owner.[8]

The rule of thumb is that if the legal incidence of the

[8] See also *Du Pont v. Commissioner of Internal Revenue*, 289 U.S. 685, 689, 77 L.Ed. 1447, 1449 (1932).

state tax is upon a private person, it is of no import that the economic incidence is upon the sovereign either state or federal.[9]

This is true even if a valid federal activity is involved, *Silas Mason Co. v. Tax Commission*, 302 U.S. 186, 82 L.Ed. 187 (1937) unless Congress has specifically declared such contractors or lessees exempt, *Carson v. Roane Anderson*, 342 U.S. 232, 96 L.Ed. 257 (1952), and *Esso Standard Oil v. Evans*, 345 U.S. 495, 97 L.Ed. 1174 (1954).

Where ad valorem taxes are involved, the question is whether the legal incidence of the tax is upon the *res* owned by the United States. Bare title alone is not the *res*.

Perhaps the most important decisions in this area are the conditional sales cases. In *S. R. A. v. Minnesota, supra*, the United States sold property on a conditional sale to a private citizen specifically reserving legal title until paid in full. Minnesota levied its property tax. The question was the

> "Power of Minnesota to tax realty within the boundaries of that state, when the legal title remains in the United States." 90 L.Ed., p. 854.

The answer was

> "The whole equitable ownership is in the petitioner and the value of that ownership may be ascertained on the basis of the full value of the land." *New Brunswick v. United States, supra*, 276 U.S. 547, 72 L.Ed. 693 (1928), 90 L.Ed. at p. 860.

Where mining claims are involved, federal title is also

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[9] *Alabama v. King & Boozer*, 314 U.S. 1, 86 L.Ed. 3 (1941); *Du Pont de Nemours v. State*, 44 Wn.(2d) 339, 267 P.(2d) 667 (1954).

no bar to state property taxation. *Elder v. Wood*, 208 U.S. 226, 52 L.Ed. 464 (1908).

On an issue involving consumer sales taxes upon materials for a military housing project under what appears an identical lease, the Florida Supreme Court held that beneficial ownership, not "paper title" controls, *Gay v. Jemison*, 52 So.(2d) 117 at 137 (Fla. 1951), see also *Moses Lake Homes, Inc., v. State Tax Comm.*, 148 Wash. Dec. 462 (Adv. No. 16, Mar. 15, 1956).

In *Railroad Co. v. Penniston*, 85 U.S. 5 (Wall. 1873), the United States had chartered the Union Pacific Railroad. The corporation was assisted by direct federal loans and it contracted to construct lines, carry troops, mails, etc. The Nebraska ad valorem tax was held to be valid. See also *Thomson v. Pacific Railway*, 76 U.S. 111, 19 L.Ed. 792 (1870); *Wisconsin R. Co. v. Price County*, 133 U.S. 496, 33 L.Ed. 687 (1890), and *Nor. Pac. R. Co. v. Patterson County Treas.*, 154 U.S. 130, 38 L.Ed. 934 (1894).

See also the numerous citations in *Haumesser v. Chehalis County*, 76 Wash. 570 at 574, 136 Pac. 1141 (1913), where although the facts were different the court quoted with approval:

> "It is the well-established doctrine that he who has the right to property and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of taxes. *Railroad Co. v. Price, supra*, 133 U.S. 496." See 33 L.Ed. at p. 692.

For cases more directly in point,[10] see *P. W. & B. R.*

[10] *Russell v. New Haven*, 51 Conn. 259 (1883); *Burbank v. Board of Assessors*, 27 So. 947 (La. 1900); *Norfolk v. J. W. Perry Co.*, 61 S.E. 867 (1908); *Hines Lumber Co. v. Lane County*, 248 P.(2d) 720 (Ore. 1952); *Ex Parte Gaines*, 19 S.W. 602 (Ark. 1892); *Bentley v. Barton*, 41 Ohio St. 410 (1884).

Co. v. Appeal Tax Court, 50 Md. 397 (1879). A railroad company leased land from a tax exempt city for a 99-year term. The court held (1) the lessee should be taxed on the land to the extent of its leasehold interest, and (2) directly upon the improvements erected by the lessee at their full value. The court stated:

> "As to the improvements placed upon the two parcels leased from the city by the appellant, we fully concur with the court below, that they were placed upon the demised premises by the appellant for its own use and benefit, they were properly assessed to the appellant at their full assessable value."

In *Broadway and Fourth Ave. Realty Co. v. Louisville*, 197 S.W.(2d) 238 (Ky.), a realty company leased land from a tax exempt educational institution for 99 years. The court held the lessee should be taxed on the improvements erected by it as if it had title and full ownership.

Outer Harbor, Dock & Wharf Co. v. Los Angeles County, 193 Pac. 142 (Cal. App. 1920). The lessee constructed a wharf and warehouse on leased state lands and was properly taxed on the improvements as owner. See also *San Francisco v. McGinn*, 7 Pac. 187 (Cal. 1885), where the lease was but for 50 years. Compare *San Diego County v. Davis*, 33 P.(2d) 827 (Cal. 1934).

3. Appellate decisions on th e housing projects

Every appellate court decision rendered as of this writing has held the state property tax applied to these identical housing projects whether the enclave on which the property was constructed was under exclusive jurisdiction or not.

Where title was clearly in the lessee, this has been used as an additional ground. See *Fort Dix Apartment Corp. v. Borough*, and *Sheridanville, Inc., v. Borough*, 125 F.Supp. 743 (1954), taxability affirmed on appeal, 225 F.(2d) 473 (1955) pet. for cert. pending No. 484; *Meade Heights, Inc., v. Tax Commission*, 95 A. (2d) 280 (Md. 1953); *Gay v. Jemison*, 52 So.(2d) 117 (Fla. 1951); *Dayton Devel: Ft. Hamilton Corp. v. Boyland*, 133 N.Y.S. 821 (1954); *Conley Housing Corp. v. Coleman*, Sup. Ct. of Georgia, No. 19001 (Sept. 12, 1955); and this case, *Offutt Housing Co. v. County of Sarpy*, 70 N.W.(2d) 382 (Neb. 1955).

The above decisions also held that Congress had specially consented to this taxation.

III. Congress Has Provided Such Housing Projects Taxable to Appellants

A. General Congressional Approach

Our position is that these projects were (1) taxable under general law and (2) Congress did all it could to insure they remained taxable.

For some years, Congress has been concerned not only about military housing but all housing. Its policy in passing the Housing Act of 1949 (42 U.S.C.A. Sec. 1701, *et seq.*), was

> "The goal of a decent home and a suitable living environment for every American family." S. Rpt. 84, H. Rept. 590, Conf. Rpt. 975, U.S. Code, Cong. Serv. 81st Cong. 1st Sess., 1949, pp. 1551-2, 1559.

Similarly, Congress was concerned in the Alaska housing act with the

> "extremely acute housing shortage"

in Alaska. P.L. 52, Ch. 89, S. Rept. 129, U.S. Code Cong. Serv. Vol. 2, 81st Cong. 1st Sess. 1949, p. 1245. If adequate housing for families of service men were not available, Congress was and should be concerned. However, there is nothing in the Act or in its legislative history to indicate Congress altered its policy that these projects be taxable even where the F.H.A. became owner.

Where a federal instrumentality has been established to act in a particular fiscal field, income and debentures were exempted federal and state taxation, but the property itself has uniformly been made taxable.[11]

If appellant here defaulted and the F.H.A. took over the project and its operation, these taxes would be paid, *Byram Holding Co. v. Bogren, supra,* note 11. May appellant claim Congress intended it enjoy a more preferred position. The claim cannot be based on low rent reasons if taxes would be due if the F.H.A. took over the project. There is no allegation that appellant is a federal instrumentality or that its corporate income, bonds, stocks, etc., are exempt.

Congress properly felt its over-all position should obtain. If federal instrumentalities paid state property

[11] Federal Reserve Banks, 12 U.S.C.A. §§531, 548 (3); Federal Land Banks, National Farm Loan Associations, 12 U.S.C.A. §§931, 932 and 933; *United States v. Stewart,* 311 U.S. 60, 85 L.Ed. 40 (1940); Federal Farm Mortgage Corp., 12 U.S.C.A. §1020f; Production Credit Corporations, and Banks for Cooperatives, 12 U.S.C.A. §1138c (Supp.); National Agric. Credit Corps, 12 U.S.C.A. §§548 and 1261; Fed. Home Loan Banks, 12 U.S.C.A. §1433; Home Owners Loan Corp., 12 U.S.C.A. §1464h (Supp.); UNDER NATIONAL HOUSING ACT, (1) War Housing Insurance, 12 U.S.C.A. §1706b, *Byram Holding Co. v. Bogren,* 63 A.(2d) 822 (N.J. 1949); (2) Mortgage Insurance, 12 U.S.C.A. §§1713i and 1714, *Byram* case, *supra;* (3) National Mortgage Associations, 12 U.S.C.A. §1722; (4) War Housing Insurance, 12 U.S.C.A. §1741; and even Federal Credit Unions, 12 U.S.C.A. §1768.

taxes, private parties should not be exempt. Local citizens whether military or civilian should pay their fair share of local services. A good summary of the pertinent legislative history is found in House Rept. 854. U.S. Code Cong. Serv. 81st Cong. 1st Sess., 1949, pp. 1757, *et seq.*

B. Specific Congressional Intent

This lease was specifically (R. 132) executed under the authority of 10 U.S.C.A. 1270-1270(d) (1947 Act) and 12 U.S.C.A. Sec. 1748 *et seq.* (1949 Act).

(a) 1947 Act

In 1947, the Air Force was authorized to lease federal property to private persons for a period of not more than five years unless a longer period would promote the national defense, 5 U.S.C. Sec. 626 s-3.

Section 6 of that Act (61 Stat. 775, 5 U.S.C. Sec. 626 s-6 (bound volume)) provided specifically that:

> "The lessee's interest, made or created pursuant to the provisions of this Act *shall be made* subject to state or local taxation." (Emphasis supplied.)

Further,

> "Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by state and local governments by Acts of Congress, in such event the terms of such lease shall be renegotiated."

The purpose of this section was stated to be

> "Sec. 6 provides that the interest a lessee holds under this Act shall be subject to State or Local taxes," S. Rpt. 626, U.S. Code Cong. Serv. 1947, 81st Cong., 1st Sess., pp. 771, 1593.

The second portion was explained:

> "In the event of States not presently having legislation permitting the taxing of such property enacting such laws subsequent to the negotiation of a lease under this Act, this section provides the lease may be renegotiated." U.S. Code Cong. Serv. 1947, 1st Sess., 81st Cong., p. 1593.

(b) 1949 Act

In 1949, the F.H.A. government insurance program for private housing was working sufficiently well that Congress determined that the same Act and procedures could be utilized for military family housing. The Act of 1949 or "Wherry Act," added Title VIII to the National Housing Act. It removed the five-year limitation and provided for F.H.A. mortgage insurance. In the event of default, the F.H.A. would acquire all interests of the lessee. These projects were considered already taxable, but to prevent any question if the F.H.A. took over a project, 12 U.S.C. Sec. 1748f, (63 Stat. 570, Sec. 807), provided:

> "Nothing in this sub-chapter shall be construed to exempt any real property acquired and held by the [F.H.A.] Commissioner under this Title by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed."

Congress described its intention in this provision as:

> "Sec. 807 would provide that the acquisition of real property by the Commissioner would not *exempt* it from taxation." (Emphasis Supplied) House Rpt. 854, U.S. Code, Cong. Serv. 1949, 81st Cong., 1st Sess, p. 1764.

The legislative history of the Wherry Act of 1949

is found in U.S. Code, Cong. Serv., 81st Cong., 1st Sess. 1949, p. 1752 *et seq.* Congress was following established patterns. There was no reason to exempt income as the lessees were private not federal instrumentalities and even less reason to exempt property. Contrary to appellant's (Br. 15) statement as to Government financial participation, the report states that:

> "No cost to the government would be involved unless, through deactivation, or curtailment of military installation or other causes, there are losses in excess of the premium and other payments by the Mortgagee to the insurance fund." Hse. Rpt. 864, *supra*, p. 1760.

If the premiums were properly established, the insurance fund, not the government, would suffer the loss.

No clearer contemplation of lessee ownership can be found than those provisions relating to condemnation of the project. Congress stated:

> "Provision is made under which a mortgagee could receive the proceeds of the insurance in the event all or a substantial part of the mortgaged property is condemned or otherwise acquired by the United States for military purposes. Although it appears unlikely that the armed services would seek to acquire property already serving their needs, there would appear to be no reason why mortgagees should be deprived of the benefits of the insurance in any such types of cases." House Rpt. 854, *supra*, p. 1763.

(c) The 1955 Act

In the Housing Amendments Act of 1955, Title VIII (Military Housing) was replaced by Title IV. Appel-

lant infers (Br. 5-6) that Congress abolished state taxation by this Act while Congress itself states:

> "Title IV of the bill relates to privately financed military housing. It would bring the Wherry Act up to date, and make it a fully workable vehicle for starting *privately financed and privately owned housing* in many areas where housing for the military may be needed. Under this Act, some 88,000 units for military personnel have been or are in the process of being built for military personnel with private funds. It does not seem desirable to abandon this useful Act; rather, it seems preferable to try to make it as workable as possible and use it whenever it can do the job." (Emphasis Supplied) H. Rpt. 913, U.S. Code, Cong. Serv. 1955, p. 2931.

As to "ownership" of existing housing projects, Congress said:

> "S. 2126 also includes a provision which would permit the military to purchase any Wherry Act project, where the owner or owners of such project are willing, at a fair market value of the property as determined by an independent appraisal, or to acquire the property by condemnation in case reasonable efforts to negotiate a purchase are unsuccessful." Hse. Rpt. 913, *supra*, p. 2932.

(d) Appellate cases

Every appellate decision dealing with taxability of these projects has held them taxable to the lessee. It has made no difference that "title" in some instances was in the United States or that the enclave may have been in "exclusive" federal jurisdiction.

1. *Sheridanville, Inc. v. Borough of Wrightstown*;
2. *Fort Dix Apartments Corp. v. Borough*: The dis-

trict court upheld taxability, 125 F. Supp. 743 (1954). This was affirmed on appeal to the Third Circuit, 225 F.(2d) 473 (1955). There each corporation leased federal land from the military, upon which each constructed a similar housing project under similar if not identical terms. The tax imposed was a property tax on the improvements.

> "The Fort Dix Apartment Corp. lease provides that any buildings erected upon the leased premises become upon completion, the property of the United States leased to the corporation. Sheridanville's lease on the other hand, provides that title to any improvements constructed on the leased premises remains in Sheridanville during the life of the lease * * *." 225 F.(2d), p. 474.

A petition to this court for *certiorari* (apparently in the *Fort Dix case*) is now pending, No. 484 or 499.

In both these cases, the land was in the exclusive jurisdiction of the United States. The district court stated relative to beneficial ownership:

> "The fact is that in no case will the burden of this tax fall upon the United States. Indeed, in the light of the terms and conditions of the plaintiffs' leases the title of the Government to these properties is only a paper one and to all intents and purposes they may well be considered the properties of the private corporate plaintiffs here in view of the fact that their complete domination over the properties extends for a period of seventy-five years—obviously a goodly life term for them." 125 F. Supp. at p. 753

3. *Meade Heights, Inc. v. State Tax Com.*, 95 A.(2d) 280 (Md. 1953). There several corporations leased federal land also within the exclusive jurisdiction of the

United States. The lease provided in effect that title to the improvements was to remain in the corporate lessees (R. 211). The Maryland Court held that the lessees had the only substantial interest in the improvements and upheld the tax. It further held that Congress had consented to the taxation, 95 A.(2d) at p. 284. The United States as intervenor contended that its reversionary interest was included in the measure of taxed value but this was denied. Neither the United States nor the taxpayers sought *certiorari*.

4. *City of Annapolis v. Arundeland, Inc.*, 106 A.(2d) 493 (Md. 1954). Although involving a different question, the parties admitted the validity of the *Meade Heights* decision, and the court affirmed it.

5. *Westinghouse Elec. Corp. v. State Tax Comm.*, 111 A.(2d) 661 (Md. 1955) again affirmed the *Meade Heights* decision, pp. 664-5. The court also stated that if the government had title, why were provisions included permitting the government to *acquire* title through mortgage foreclosure, etc. Further, why was not the government the beneficiary of at least some of the insurance proceeds in the event of destruction of the property.

6. *Guy v. Jemison*, 52 So.(2d) 137 (Fla. 1951). This involved retail sales taxes imposed on consumers upon materials used in construction of one of these housing projects on federal lands. The lease appears to be identical. The court held that both by consent of Congress, 52 So.(2d) at p. 137 and under the general doctrine of beneficial ownership the taxes were valid. The Florida statute specifically exempted:

"'Sales made to contractor of tangible personal property going into and becoming a part of public works and projects owned by' * * * the United States." p. 138

The Court thoroughly discussed the lease provisions relative to the improvements and held that the government had a bare "paper title" to the improvements, thus the tax was valid.

7. See also *Tampa Bay Garden Apartments, Inc. v. Gay*, 55 So.(2d) 739 (Fla. 1951) confirming the *Jemison* case and requiring the operator of a housing project located on an Air Base apparently in all respects such as we have here to collect the state sales taxes on these rentals.

8. *Dayton Devel. Ft. Hamilton Corp., et al. v. Boyland*, 133 N.Y.S.(2d) 821 (1954). Title to the land was in the United States and title to the improvements was in the lessee. The court reviewed the statutes involved, upheld the property tax on the lands and buildings and stated:

"Succinctly put, the taxation by state or municipality may overpass the usual limits if the consent of the United States has removed the usual limits or lowered them." p. 832

and

"The statutes which authorized leasing the lands and insuring the mortgages on the buildings contain provisions which demonstrate that Congress intended that such lands and buildings be subject to local taxation." p. 833.

9. *Marhoefer, Jr. Co. v. Dept. of Revenue, Mich., Board of Tax App.*, Mich., CCH State Tax Cases, Par. 200-087, affirmed, Michigan Court of Claims, Dkt. Nos.

461, 465 and 466, Jan. 23, 1954. Appeals taken to the Supreme Court of Michigan were withdrawn by stipulation.

10. *Conley Housing Corp. v. Coleman*, Georgia Supreme Court No. 19001, September 12, 1955. The corporation sought to enjoin personal property taxation of its rental housing project on a government owned military reservation. The lease provided title to the improvements was retained by the lessee. *Held*: Congress had directed these projects be subject to local taxation.

11. *Moses Lake Homes v. State Tax Commission*, 148 Wash. Dec. 462 (Adv. No. 16, Mar. 15, 1956) upheld retail sales taxes, the legal incidence of which is upon the consumer (R.C.W. 82.08.050) imposed upon sales of materials used in constructing a similar project.

In cases where title was in the United States, taxation was upheld because the lessee was owner and thus taxable and Congress had consented. Where title was retained by the lessee, this was given as an additional reason supporting taxation.

12. Lastly, of course, this case—*Offutt Housing Company v. County of Sarpy*, (R. 195-214) 70 N.W.(2d) 382 (Neb. 1955).

See also *Aztec Land and Cattle Co. v. Navajo Realty Co.*, Arizona, Dkt. No. 210, *certiorari* denied, October 17, 1955. The fact that the United States held legal title to lands did not exempt them from taxation where title was in trust and beneficial ownership was in private hands.

CONCLUSION

There are a great number of these housing projects. From the reported cases, they are all being taxed. The United States Attorney General could not deem that federal property was being taxed or a federal policy controverted or he would be present.

Under general and Nebraska law (R. 206-7, 209-10), these housing projects would be taxed to the lessee were the lessor a private party or an exempt state entity. When the lessor is an exempt federal entity the same result should prevail unless Congress specifically directs otherwise.

Even assuming, contrary to the specific language of the government prepared mortgage, that the Air Force had title, appellant is the owner of all beneficial interests. The bare title and the reversionary interest on condition subsequent of the United States as lessor is not such an interest to prevent taxation of the improvements at their full value to the lessee.

Appellant has failed to allege or prove the "value" of the reversionary interest of the United States and that such interest was included in the measure of the valuation.

Congress could, we assume, exempt these housing projects from local taxation. It did not. Rather, in accordance with its uniform policy in dealing with local governments, it provided they should be taxed.

State and federal appellate courts have analyzed the common or general law governing these leases and the applicable federal statutes. All have concluded that the

improvements were taxable to the lessee and that Congress had consented even though federal jurisdiction was exclusive. Their reasoning is more than persuasive particularly upon non federal issues.

The decision of the lower court should be affirmed.

Respectfully submitted,

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